Scan for PEP Newsletter Winter 2025

Ruth Keating

Celia Reynolds

Talk 6: Environmental Case Law Update

39 Essex CHAMBERS

39 Essex Chambers
#39Events

ENVIRONMENTAL LAW CASE UPDATE

- *Shell UK Ltd v Persons Unknown* [2024] EWHC 3130 (KB)
- *White v Plymouth City Council* [2024] EWHC 2854 (Admin)
- *Manchester Ship Canal v United Utilities Water Ltd* [2024] UKSC 22
- *R (OAO Friends of the Earth) v SSEFRA* [2024] EWHC 2707 (Admin)
- *R (Friends of the Earth, ClientEarth & GLP) v SSESNZ* [2024] EWHC 995 (Admin)
- Following on from *Finch – Friends of the Earth Ltd v SSLUHC* [2024] EWHC 2349 (Admin) and *Greenpeace Ltd v Advocate General for Scotland Uplift, Petitioner* [2025] CSOH 10
- *CG Fry & Son Ltd v Secretary of State for Levelling Up, Housing and Communities* [2024] EWCA Civ 730

SHELL UK LTD V PERSONS UNKNOWN [2024] EWHC 3130 (KB)

- In three separate but connected claims, the claimant oil companies in *Shell* sought final injunctions against named protestors and persons unknown.
- Two named protestors, appearing in person, requested the court to consider:
  - Whether peaceful acts contrary to the law and the rights of others under the civil law are protected by the Aarhus Convention? (§6)
  - Whether the Aarhus Convention protects environmental defendants from "excessive use of the law", suggesting that "*the simultaneous use of criminal and civil proceedings*" was oppressive (at §133).

- Article 3(8) Aarhus Convention: "*Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings*."

SHELL UK LTD V PERSONS UNKNOWN [2024] EWHC 3130 (KB)

- *"while the United Kingdom has not incorporated Article 3(8), nor has it disowned it. This country continues to be a signatory to Aarhus. Thus, it must be taken to respect its terms and all of them save for any reservations*."
- Aarhus Convention relevant to environmental rights and protest about environmental issues;
- Also relevant to interpretation of substantive ECHR rights - particularly Articles 9, 10 and 11.
- In the context of 'civil disobedience' there was "*no basis within Aarhus that authorizes environmental defenders to deliberately break or flout the law or materially violate the lawful rights of others*" (§165).
- Aarhus might be engaged in other contexts, such as "*the putative case of arrests and prosecutions or the granting of an injunction to prohibit entirely peaceful protesters such as those who have regularly gathered with placards near to Shell infringing any of Shell's rights.*"

WHITE V PLYMOUTH CITY COUNCIL [2024] EWHC 2854

- LA seeking to fell 129 trees, uses "urgency procedure"

17:54 – decision published

18:00 – C becomes aware of decision

19:00 – site mobilized for felling

20:00 – tree felling begins

21:00 – C speaks to solicitor, who advised seeking an injunction

00:29 – injunction granted, on condition that C issue JR proceedings by close of business that day

00:52 – LA informed of injunction by email

01:03 – all works cease

WHITE V PLYMOUTH CITY COUNCIL [2024] EWHC 2854

- C applied for LA to be committed for contempt of court for:
  - interfering with due administration of justice (Ground 1)
  - Breaching an injunction (Ground 2)
- Permission on grounds 1 & 2 refused
- Costs protection under Aarhus Convention?
  - CPR r46.24

WHITE V PLYMOUTH CITY COUNCIL [2024] EWHC 2854

- CPR r46.24 ha to be “sensibly read" to include “*interim injunction proceedings that are made in anticipation of and in contemplation of judicial review proceedings. To hold otherwise would mean that the United Kingdom Government, as a Party to the Aarhus Convention, was not giving proper effect to that Convention when setting out its cost protection rules*" (§74).

- The requirement to provide adequate and effective remedies must include injunctive relief that preceded, but is conditional on, the lodging of a claim for judicial review (§75).

- Applicants for interim injunctive relief may benefit from costs protection under the Aarhus Convention

MANCHESTER SHIP CANAL V UNITED UTILITIES WATER LTD [2024] UKSC 22

MANCHESTER SHIP CANAL V UNITED UTILITIES WATER LTD [2024] UKSC 22

- *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66; 2004 2 A.C. 42:
  - No cause of action in nuisance for failure to construct more sewers
  - While owners of land have a duty to take reasonable steps to prevent a nuisance arising from a known hazard *(Sedleigh-Denfield*), court is not in a position to judge when it would be reasonable to construct a new sewer [64]
  - S. 94(1), WIA 1991 imposes duty to construct a new sewer
  - S. 18(8), preserves common law remedies where breach of statutory duty is not an essential ingredient of action
- High Court grants declaration. Upheld by CoA.
  - Applying *Marcic,* breach of s. 94 was essential to cause of action
  - Therefore s. 18(8) excluded the cause of action

MANCHESTER SHIP CANAL V UNITED UTILITIES WATER LTD [2024] UKSC 22

- SC grants appeal
- *Marcic* had been improperly construed as excluding any claim where preventing the nuisance would involve capital expenditure or a policy decision. *Marcic* dismissed because the duty to build more sewers arose only under s. 94(1) and s. 18 provided an exclusive remedy.
- Express statutory language required to authorise interference with canal owner's property/ deprive canal owner of cause of action.
- Common law remedies are available to the owner unless the polluter can demonstrate that it was acting within its statutory powers. In this case:
  - Discharge of untreated effluent was not inevitable consequence of the performance of the s. 94 duty
  - S. 117(5) prohibited the discharge of untreated sewage effluent and s. 117(6) prohibited undertakers from carrying on their duty in a way that created a nuisance
  - Unlike *Marcic*, there was a cause of action in tort independent to breaches under WIA 1991

R (OAO FRIENDS OF THE EARTH) V SSEFRA [2024] EWHC 2707 (ADMIN)

Policy paper

Third National Adaptation Programme (NAP3)

This report sets out the actions that government and others will take to adapt to the impacts of climate change from 2023 to 2028.

From: Department for Environment, Food & Rural Affairs

Published 17 July 2023

Last updated 21 February 2024 — See all updates

R (OAO FRIENDS OF THE EARTH) V SSEFRA [2024] EWHC 2707 (ADMIN)

- **Ground One:** error in construing the requirements for 'objectives' under s. 58(1)(a). Must be read in accordance with s. 3, HRA 1998 and Articles 2, 8, 14 and A1P1 ECHR, to have in place an effective framework for climate change, specifically addressing adaptation risks

- **Ground Four:** SoS had acted contrary to the Claimant's rights under Articles 2, 8, 14 and A1P1

Section 58, CCA 2008: requires the SoS to "*lay programmes before Parliament setting out:*

(a) objectives… in relation to adaptation to climate change
(b) the Government's proposals and policies for meeting those objectives, and
(c) the time-scales for introducing those proposals and policies, addressing the risks identified in the most recent report under section 56."

R (OAO FRIENDS OF THE EARTH) V SSEFRA [2024] EWHC 2707 (ADMIN)

Ground One:

- Chamberlain J adopts two stage approach.
- Distinction between climate adaptation vs climate mitigation
- Narrower margin of appreciation for setting objectives but a wider margin of appreciation for selecting means to achieve those objectives.

Ground Four:

- The margin of appreciation for identifying adaptation aims is wider than that for identifying mitigation aims. Margin for choosing the means is wider still [105].
- Specific scheme in place was sufficient.
- Claim failed.
- However, *VKS* too strict. Provisional view taken that it would be wrong to shut out individual claimants if they had a well-founded claim that specific adaptation measures fell outside margin of appreciation.

R (FRIENDS OF THE EARTH, CLIENTEARTH & GLP) V SSESNZ [2024] EWHC 995 (ADMIN)

- Challenge to the Carbon Budget Delivery Plan laid before Parliament in March 2023.
- Five grounds of challenge were advanced (at [93] of the judgment).

- **Grounds 1 to 3**: the Secretary of State had inadequate evidence concerning the delivery risk to policies and so he could not rationally conclude the policies would achieve their projected emissions reductions.

- **Ground 4:** statutory interpretation concerning section 13(3) of the Climate Change Act 2008.

- **Ground 5:** concerned the Secretary of State's duty to publish a consultation document under section 14 of the Climate Change Act 2008.

R (FRIENDS OF THE EARTH, CLIENTEARTH & GLP) V SSESNZ [2024] EWHC 995 (ADMIN)

- **Section 13** – Secretary of State had to prepare proposals and policies that would enable relevant carbon budgets up to and including the sixth carbon budget ("**CB6**") (for the period 2033-2037), to be achieved.

- **Section 14** – Secretary of State obliged to set out for Parliament his proposals and policies for meeting those budgets.

- The Secretary of State laid the Carbon Budget Delivery Plan before Parliament pursuant to the order in *R (on the application of Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin).

R (FRIENDS OF THE EARTH, CLIENTEARTH & GLP) V SSESNZ [2024] EWHC 995 (ADMIN)

- **Key takeaway:** presentation of risk.
- The package of proposals and policies that could be quantified would deliver sufficient quantified savings to meet 97% of CB6 (relied on the package being delivered in full).

- "*Our advice is that it is reasonable to expect this level of ambition – having regard to delivery risk (see Annex B) and the wider context".*

- Only those proposal and policies which were at most risk of not being achieved that further analysis was needed [136]

R (ON THE APPLICATION OF FINCH ON BEHALF OF THE WEALD ACTION GROUP) V SURREY COUNTY COUNCIL AND OTHERS [2024] UKSC 20

- Lord Leggatt majority.
- *"You can only care about what you know about."* [21]
- *"The legislation does not prevent the competent authority from giving development consent for projects which will cause significant harm to the environment. But it aims to ensure that, if such consent is given, it is given with full knowledge of the environmental cost".* [6]

FRIENDS OF THE EARTH LTD V SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES [2024] EWHC 2349 (ADMIN)

- Holgate J (as he then was).

- [97] to [98]: **(1)** sufficient causal connection test; **(2)** irrelevant factors; and **(3)** conclusions on substitution.

- Substitution: *"[106] … But that offsetting does not mean that substitution of US coal is a relevant factor in determining whether the burning of Whitehaven coal is a likely significant effect of the proposed development. Any such offsetting which could be justified should not be confused with the question whether the extraction of Whitehaven coal is in law a relevant cause of the burning of that coal. Likewise, the fact that the 2011 Regulations require the "significance" of an effect to be assessed, which can have a quantitative aspect, does not justify eliding these two different issues of cause and effect."*

FRIENDS OF THE EARTH LTD V SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES [2024] EWHC 2349 (ADMIN)

- *"[112] … As a general proposition, the more serious the risk (generally a combination of likelihood and consequences), so the decisionmaker may expect more cogency in, or apply a precautionary approach to, the material addressing that risk (Satnam at [108])."*

- *"[115] …It was for WCM to assess in its ES the very large amount of GHGs which would be emitted from the burning of the Whitehaven coal. In so far as WCM wished to claim that the US substitution effect would be just as large, so that there would be no net increase in GHG emissions, or alternatively that there would be some lesser offsetting effect, it was for WCM to produce information in its ES to demonstrate that point, including legal causation in relation to substitution. Regulation 22 of the 2011 Regulations confirms that it is the applicant who is responsible for producing information which is legally essential for a compliant ES."*

- *"[116] … The public was entitled to participate in an EIA process in which they could respond to such material. It was not for the public to have to produce key components of that information."*

ROSEBANK AND JACKDAW OIL AND GAS FIELDS

- Government confirmed that it would not challenge the judicial review.
- Substantive hearing in November 2024.
- The hearing focused on remedy.
- Shell, which operates the Jackdaw gas field said: "*We accept the Supreme Court's ruling in the Finch case, but will argue that Jackdaw is a vital project for UK energy security that is already well under way. Stopping the work is a highly complex process, with significant technical and safety issues now that infrastructure is in place and drilling has started in the North Sea.*

GREENPEACE LTD V ADVOCATE GENERAL FOR SCOTLAND UPLIFT, PETITIONER [2025] CSOH 10

- The developers' arguments as to time, cost and other practical difficulties associated with stopping work on the complex projects [79] did not justify the court refusing to quash the consents and ordering the decisions to be remade.
- Energy security and job creation not matters for the court [67].
- The developers took on the risk that the consents would be unlawful [67] and [121] to [122].
- Ultimately it was the developers' commercial decision to proceed on risk [125].
- New guidance in Spring 2025.

GREENPEACE LTD V ADVOCATE GENERAL FOR SCOTLAND UPLIFT, PETITIONER [2025] CSOH 10

- *"**151.** Having considered all the circumstances of the case and the various public and private interests, I have reached the conclusion that the balance lies in favour of granting reduction. The public interest in authorities acting lawfully and the private interest of members of the public in climate change outweigh the private interest of the developers. The factors advanced by Shell, Equinor and Ithaca in respect of their private interest do not justify the departure on equitable grounds from the normal remedy of reduction of an unlawful decision.*

- ***152.** The decisions will be reduced, and can be taken again, this time taking into account downstream emissions."* (emphasis added)

CG FRY & SON LTD V SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES [2024] EWCA CIV 730

- UKSC hearing 17 and 18 February 2025.
- Granted outline planning permission in December 2015 for a mixed-use phased development of up to 650 homes and associated development.
- 2020 Natural England advice note.
- 2021 the Appellant had sought discharge of the planning conditions.
- High Court Sir Ross Cranston held that Article 6(3) of the Habitats Directive required a project should not be agreed until an appropriate assessment had been undertaken. See [49] to [52].
- *Harris v Environment Agency* [2022] EWHC 2264 (Admin) **and direct effect.**
- **Court of Appeal – a more straightforward approach.**

CG FRY & SON LTD V SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES – THE UKSC

- **Ground 1:** Whether the judge was wrong to hold that regulation 63 of the Habitats Regulations applied at the discharge of conditions stage.
- **Ground 2:** Whether the judge erred in holding that the policy in paragraph 181 of the NPPF which has the effect of applying equivalent protection to Ramsar sites, was a material consideration.
- OEP and Wildlife and Countryside Link interventions.
- To be continued.

Scan for PEP Newsletter
Winter 2025

Ruth Keating

Celia Reynolds

Ruth.Keating@39essex.com
Celia.Reynolds@39essex.com

39 Essex CHAMBERS

39 Essex Chambers
#39Events